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No. 94-451

In the Supreme Court of the United States

OCTOBER TERM, 1994

DAVID WAYNE HOLLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who claimed to be a victim of selective prosecution, was improperly denied discovery of government documents.

2. Whether a district court may depart downward from the Sentencing Guidelines range applicable to a perjury offense because the perjury occurred in a civil proceeding.

3. Whether the district court committed plain error when it did not instruct the jury on the "two witness" rule in a prosecution for perjury under 18 U.S.C. 1621.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-32) is reported at 22 F.3d 1040.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 33-34. The petition for a writ of certiorari was filed on September 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of three counts of perjury, in violation of 18 U.S.C. 1621. The district court departed downward from the Sentencing Guidelines, sentenced petitioner to concurrent terms of two years' probation on each count of conviction, placed petitioner on home detention for six months, and ordered him to pay $761.50 in restitution. Gov't C.A. Br. 4. The court of appeals affirmed petitioner's convictions but, on the government's cross-appeal, vacated petitioner's sentence and remanded for resentencing. Pet. App. 17-32.

1. Petitioner was the founder and grand dragon of a group known as the Southern White Knights, Knights of the Ku Klux Klan (Southern KKK). In January 1987, he, members of the Southern KKK, and members of other Klan organizations disrupted a march held in Forsyth County, Georgia, in honor of the birthday of Martin Luther King, Jr. Because of that incident, a civil rights class action styled *Williams* v. *Southern White Knights, Knights of the Ku Klux Klan, Inc.*, No. 1:87-CV-565-CAM (N.D. Ga. 1987), was filed against petitioner and Southern KKK. Trial began in September 1988, and on October 5, 1988, the jury returned a verdict against petitioner in the amount of $450,000, based on a finding that petitioner and Southern KKK had conspired to deprive the plaintiffs of their civil rights, in violation of 42 U.S.C. 1985. Pet. App. 19 & n.3; Gov't C.A. Br. 4-5.

Petitioner appealed that judgment. On January 4, 1989, petitioner moved the district court for leave to prosecute his appeal *in forma pauperis*. In an affidavit accompanying the motion, petitioner stated that he did not "own any stocks, bonds, notes or automobiles, or

anything else that is of any value." Relying on the affidavit, the district court granted petitioner's motion. Pet. App. 19-20.

The attorney for the *Williams* plaintiffs, Morris Dees of the Southern Poverty Law Center (SPLC), retained another attorney, Brian Spears, to obtain satisfaction of the civil rights judgment from petitioner. In July 1989, in order to determine petitioner's financial status, Spears took petitioner's deposition. Dees had petitioner's deposition transcribed and presented it, with petitioner's *in forma pauperis* affidavit, to the United States Attorney for the Northern District of Georgia. Dees desired that petitioner be indicted for perjury. Pet. App. 20.

On March 15, 1990, a grand jury in the Northern District of Georgia indicted petitioner on five counts of perjury and one count of obstruction of justice. Counts 1 and 2, brought under 18 U.S.C. 1621(2), charged petitioner with making false statements about his assets in the *in forma pauperis* affidavit. Counts 3, 4, and 5, brought under 18 U.S.C. 1621(1), charged him with making similar false statements in the Spears deposition.[1] Count 6, brought under 18 U.S.C. 1503, charged petitioner with obstructing justice by encouraging a witness, Verla Mayo, to give false testimony before the grand jury investigating the case. Pet. App. 20. Count 6 was dismissed before trial, see *id.* at 21 n.5, and is not relevant to the issues presented in the petition.

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[1] The false statements charged in the indictment were that petitioner had earned no income in the preceding 12 months (Count 1), that he owned nothing of value (Count 2), that he had sold his boat (Count 3), that he had sold his car (Count 4), and that a $3,500 check he had written to Verla Mayo was a prepayment for services (Count 5). Pet. App. 20 n.4.

2. Before trial, petitioner moved to dismiss the indictment on the basis of selective prosecution. In connection with an evidentiary hearing on the motion, he subpoenaed documents and telephone records from the SPLC and its attorneys, the Department of Justice, the prosecutor, the Federal Bureau of Investigation's agent assigned to the case, and two telephone companies. See Gov't C.A. Br. 2. On July 18, 1991, after a hearing on motions to quash the subpoenas, a magistrate judge ordered the subpoenas for telephone records and SPLC documents quashed, but ordered the government to produce for *in camera* inspection any correspondence that had been exchanged between the Department of Justice and SPLC and its attorneys before the filing of the indictment against petitioner. C.A. Record Excerpts (R.E.) Tab 89, at 5, 7-9. On February 26, 1992, the district court denied petitioner's objections to the magistrate judge's order. R.E. Tab 108, at 4, 7.

3. At petitioner's trial the government established that, contrary to the statements petitioner made in his *in forma pauperis* affidavit and deposition, he owned substantial assets at the time he made those statements. The assets included a car, a boat, and a fence installation business. The government's proof also demonstrated that petitioner had testified falsely and had engaged in a series of sham transactions, in order to prevent the *Williams* plaintiffs from satisfying their judgment. Pet. App. 21.

The sham transactions included the transfer of a $3,500 check to Verla Mayo, in a purported prepayment for services, with instructions that she cash the check and return the proceeds to petitioner. Petitioner also entered into an elaborate scheme to conceal his ownership of a boat through a purported sale of the boat to one Edwin Pierce. The $1,000 used by Pierce in the

sham purchase was in fact provided by petitioner from the proceeds of the check cashed by Verla Mayo. Finally, John Avery Coor represented that he had purchased petitioner's business and automobile, when in fact petitioner continued to own and operate the business, and on two occasions after purportedly selling his car to Coor, tried to transfer the car to other persons. Pet. App. 21-22.

The government dismissed Count 1 of the indictment at the close of its case-in-chief. Petitioner presented witnesses who attempted to refute portions of the government's case. On March 13, 1992, the jury convicted petitioner on Counts 2, 3, and 5—relating, respectively, to petitioner's claims that he owned nothing of value, that he had sold his boat, and that he had prepaid certain services to Verla Mayo. The jury acquitted petitioner on Count 4 (relating to petitioner's claim that he had sold his car). Pet. App. 22.

After his trial, petitioner moved for a judgment of acquittal, contending, among other things, that the district court had erred by not instructing the jury on the "two witness" rule in perjury prosecutions. The district court rejected that claim on the ground that petitioner did not request such a charge. R.E. Tab 136, at 7, 9. The court later denied a motion for reconsideration of the same issue. 6 R. 138.

4. In the presentence investigation report, the probation officer recommended an adjusted offense level of 27 and a Criminal History Category of III. The adjusted offense level resulted from a base offense level for perjury of 12, an eight-level increase under Guidelines § 2J1.3(b)(1) for threatening physical injury to Verla

Mayo's son in an effort to induce her to testify falsely,[2] a three-level increase under Guidelines § 2J1.3(b)(2) for perjury resulting in "substantial interference with the administration of justice," and a four-level increase under Guidelines § 3B1.1(a) for his role as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The probation department accordingly determined that petitioner's Guidelines range was 87-108 months' imprisonment. Pet. App. 22-23.

At sentencing, the district court rejected each of the recommended upward adjustments. The court found that the four-level increase for petitioner's leadership role in the offense was unwarranted because petitioner "acted alone" in committing perjury. Pet. App. 24. In addition, the court concluded that Guidelines § 2J1.3 was not intended for cases in which the defendant commits perjury in a civil proceeding, and it departed downward by four levels on that ground to an offense level of eight. That level, coupled with petitioner's Criminal History Category of III, produced a Guidelines range of 6-12 months' imprisonment. The court then imposed a sentence of six months' home detention, two years' probation, and 250 hours of community service. Pet. App. 23-24.

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[2] After petitioner's indictment, when it became clear that Mayo had not supported his false version of events in her grand jury testimony, petitioner drove to Mayo's residence and began to drive up and down the street in front of the home. Mayo's young son was riding his bicycle in the street. When Mayo went outside to see what the car was doing, she observed petitioner driving the car. Once petitioner saw Mayo, he drove his car from one end of the street to the other at high speed towards Mayo's son, narrowly missing him. Gov't C.A. Br. 14.

5. The court of appeals affirmed petitioner's convictions summarily, Pet. App. 18-19 n.2,[3] but vacated his sentence and remanded for resentencing. *Id.* at 32. The court found (*id.* at 27) that the district court erred in rejecting the four-level enhancement for petitioner's role in the offense, because it did not consider the events surrounding petitioner's perjury, as required by the relevant conduct provisions of the Guidelines. See Guidelines § 1B1.3. The court noted (Pet. App. 27) that the trial evidence showed that as many as five persons had helped petitioner "by imparting an air of legitimacy * * * to his perjurious statements," and that if these persons had not been willing "to engage in sham transactions and the secreting of [petitioner's] assets," petitioner might never have committed perjury. The court further suggested (*id.* at 27-28) that regardless of whether five persons participated in petitioner's criminal activity, that activity might have been "otherwise extensive" under Guidelines § 3B1.1(a) because it "continued over a period of three years and involved the assistance of several individuals at least." Pet. App. 29. The court accordingly remanded for factual findings on those questions. *Ibid.*

The court of appeals also rejected (Pet. App. 29-32) the district court's conclusion that a downward departure was warranted because petitioner's perjury occurred during a civil proceeding. The court found (*id.* at 31) that

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[3] Petitioner had contended that the district court erred in denying his motion to dismiss the indictment for selective prosecution, in denying various discovery requests, and in failing to instruct the jury on the "two witness" rule in perjury prosecutions. Petitioner had also claimed that his false statements were not material, and that the evidence was insufficient to support his convictions. The court of appeals concluded that those claims were "meritless" and "warrant[ed] no discussion." Pet. App. 18 n.2.

neither petitioner's conduct nor the surrounding circumstances differed significantly from the conduct and circumstances to which the perjury statute normally applies. Noting that petitioner's perjury had "wasted valuable and scarce public resources," the court "categorically reject[ed] any suggestion, implicit or otherwise, that perjury is somehow less serious when made in a civil proceeding." *Ibid.* Accordingly, it held (*id.* at 32) that the district court erred when it refused to apply the perjury Guideline.

ARGUMENT

1. Petitioner contends (Pet. 9-16) that he was improperly denied discovery of government documents that would have supported his claim of selective prosecution.[4] The courts below correctly rejected that claim.

To succeed on a claim of selective prosecution a defendant must first show that he was singled out for prosecution although others similarly situated who committed the same acts have not been prosecuted. After satisfying that burden, the defendant must also demonstrate that his prosecution was constitutionally invidious; that is, motivated by constitutionally impermissible factors such as racial or religious discrimination or a desire to prevent the exercise of his

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[4] Although the first question presented in the petition is limited to government documents, see Pet. 8, the petition also discusses (Pet. 14-15) other categories of documents and records. Any claim relating to discovery of those additional documents is not fairly included within the question presented, and accordingly it is not properly before this Court. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427-428 (1993) (per curiam). In any event, as we discuss below, there is no merit to any of petitioner's additional contentions.

constitutional rights. See *Wayte* v. *United States*, 470 U.S. 598, 607-610 & n.10 (1985); see also *Jones* v. *White*, 992 F.2d 1548, 1571-1572 (11th Cir.), cert. denied, 114 S. Ct. 448 (1993); *United States* v. *Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). The district court concluded that petitioner had satisfied the first prong of that test, see R.E. Tab 104, at 6-7, because the court could not find "other prosecutions for perjury arising in civil proceedings in this district in the recent past." The court, however, found (*id.* at 22, 25) that petitioner had failed to show that his prosecution was motivated by the constitutionally impermissible purpose of deterring his exercise of his right to free speech.

Petitioner argues that he was prevented from showing constitutional invidiousness by the district court's discovery rulings. That contention lacks merit. When a party attempts to subpoena documents or records before trial, that party must show that the items to be produced are (1) relevant, (2) admissible in evidence, and (3) specifically identified. See *United States* v. *Nixon*, 418 U.S. 683, 700 (1974). The requirement of specificity is intended to prevent "general fishing expedition[s]" for documentary evidence. *Ibid.* Petitioner was unable to make the requisite showings.

First, the courts below correctly rejected petitioner's request for telephone records. As the magistrate judge observed (R.E. Tab 89, at 5), the toll records sought by petitioner would not provide relevant evidence of a selective prosecution conspiracy against petitioner because the mere fact of conversations between SPLC and the Department of Justice would not show that those conversations were conspiratorial in nature. Cf. *United States* v. *Scarpa*, 897 F.2d 63, 70 (2d Cir.) (disclosure properly denied where evidence sought irrelevant to

issues in case), cert. denied, 498 U.S. 816 (1990). Moreover, because petitioner sought production of telephone records over a period of four years, see R.E. Tab 89, at 5, his request was overbroad, excessive, and unduly burdensome for the subpoenaed telephone companies. See *United States* v. *Nixon*, 418 U.S. at 698 (oppressive subpoenas may be quashed).

Petitioner's request for SPLC documents was properly rejected as well. In his district court filings, petitioner stated that "[t]hey did it to me, so I will do it to them," and that "[w]hat is good for the goose is good for the gander." See R.E. Tab 89, at 6. From those statements and the conceded animosity between petitioner and SPLC, the magistrate judge reasonably concluded (*id.* at 6-7) that petitioner was "engaging in an attempt at retribution" and "attempting to harass" SPLC and its attorneys by requiring them to produce evidence that would be neither relevant nor admissible in connection with his selective prosecution claim. See, *e.g.*, *Nixon*, 418 U.S. at 698; cf. *Scarpa*, 897 F.2d at 70.

The courts below likewise ruled correctly on petitioner's attempt to obtain government documents. Although the magistrate judge found that petitioner's discovery request was overbroad and sought many documents that were neither relevant to, nor admissible in evidence on, his selective prosecution claim, the magistrate judge did order the government to produce for *in camera* inspection "any documents or correspondence from or between Morris Dees, Brian Spears, Southern Poverty Law Center, AUSA Schroeder, Agent Halle and the United States Justice Department" related to petitioner's indictment and dated before the return of the indictment. R.E. Tab 89, at 8. The provision for *in camera* inspection was appropriate because, as the district court pointed out (R.E. Tab 108, at 4), the

"documents at issue relate[d] directly to a government investigation." See Fed. R. Crim. P. 16(a)(2); *United States* v. *Koskerides*, 877 F.2d 1129, 1133-1134 (2d Cir. 1989) (internal government documents generally exempt from discovery; trial court's decision on discoverability of documents, after *in camera* inspection, not reversible on appeal absent clear showing of abuse of discretion); *United States* v. *Johnson*, 577 F.2d at 1309-1310 (same).[5]

Petitioner errs when he suggests (Pet. 9-11) that review is warranted because the courts of appeals are in conflict over the preliminary showing that a defendant claiming selective prosecution must make to obtain discovery of government documents. While the courts of appeals may differ in their verbal formulations of that test, see, *e.g.*, *United States* v. *Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (some evidence of elements of selective prosecution required); *United States* v. *Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (nonfrivolous showing of both elements of selective prosecution test required); *United States* v. *Kerley*, 787 F.2d 1147, 1150 (7th Cir. 1986) (colorable basis for selective prosecution claim required), the common thread running through the cases is the requirement that a defendant must do more than simply allege that both elements of the selective prosecution test are present before discovery will be ordered. See, *e.g.*, *United States* v. *Fares*, 978 F.2d at 59 (mere assertions and generalized proffer on information and belief insufficient to warrant discovery). In the present

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[5] The government conceded that it had been in contact with SPLC before the filing of the indictment and that it had received documents from SPLC. See R.E. Tab 108, at 3. As the district court noted in overruling petitioner's objections to the magistrate judge's rulings (*id.* at 2), at the evidentiary hearing petitioner had an opportunity to engage in thorough cross-examination of Dees and the prosecutor on the nature of their contacts.

case, petitioner alleged, but could not show, even after *in camera* production of pertinent government documents and thorough cross-examination of attorneys for SPLC and the government, that his prosecution was based on a constitutionally invidious motive. See Gov't C.A. Br. 26-29. There is no reason to believe that any other court of appeals would have decided the discovery issues in this case differently from the Eleventh Circuit.[6]

2. Petitioner also contends (Pet. 16-26) that the court of appeals erred in reversing the district court's decision to depart downward. While petitioner claims that the court of appeals should have deferred to the district court's finding that his case was unusual, the court of appeals correctly recognized (Pet. App. 29-30) that whether a factor was adequately considered by the Sentencing Commission in formulating the Guidelines is a question of law that is reviewed *de novo*, not a question of fact to which the clearly erroneous rule applies. Cf. *Williams* v. *United States*, 112 S. Ct. 1112, 1119 & n.2 (1992) (court must examine the Guidelines, policy statements, and commentary in determining whether factor was adequately considered; departure on basis of factor fully considered by the Commission is incorrect

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[6] Petitioner errs when, in support of his claim that he was improperly denied discovery, he suggests (Pet. 13-14) that the government transmitted a copy of the indictment to another party a day before the grand jury voted on the indictment. The evidence at the hearings on the motions to quash petitioner's subpoenas showed that the March 15, 1990, date on the facsimile transmission in question was incorrect; the transmission contained an indictment count that was not composed until March 16, 1990. See Gov't C.A. Br. 27-28. Moreover, as the district court noted (R.E. Tab 108, at 2), even if the government did transmit the indictment to SPLC, that fact would not establish that the government acted from an invidious motive.

application of Guidelines). The court of appeals correctly held that neither petitioner's conduct nor the circumstances of his offense were atypical or significantly different from the conduct to which the perjury statute ordinarily applies, and thus that those circumstances were adequately considered by the Sentencing Commission. Even if the court of appeals had incorrectly assessed the Commission's intent, however, that would not warrant this Court's review. See *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991).

3. Petitioner contends (Pet. 26-30) that the district court erred by not charging the jury on the "two witness" rule that applies to perjury prosecutions under 18 U.S.C. 1621. That claim does not warrant review.

The "two witness" rule is based on "the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath,'" because "equally honest witnesses may well have differing recollections of the same event." *Weiler* v. *United States*, 323 U.S. 606, 609 (1945). The rule therefore "requires that the alleged perjurious statement be established either by the testimony of two independent witnesses or by one witness and corroborating evidence that is inconsistent with the innocence of the defendant." *United States* v. *Chestman*, 903 F.2d 75, 81 (2d Cir. 1990) (internal quotation marks and brackets omitted), rev'd en banc on other grounds, 947 F.2d 551 (1991), cert. denied, 112 S. Ct. 1759 (1992); see also *United States* v. *Diggs*, 560 F.2d 266, 270 (7th Cir.) (rule satisfied by testimony of one witness plus "independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the falsity of the accused's statements * * * beyond a reasonable doubt"), cert. denied, 434 U.S. 925 (1977). A court must instruct on that

theory "when properly requested." *Weiler* v. *United States*, 323 U.S. at 611; see also Fed. R. Crim. P. 30.

Petitioner concedes (Pet. 27, 29) that he never requested that the jury be instructed on the two-witness rule. Petitioner's claim therefore must be reviewed under the "plain error" standard. See *United States* v. *Olano*, 113 S. Ct. 1770 (1993); Fed. R. Crim. P. 52(b).[7] Under that standard, petitioner must carry the burden of demonstrating that the court's failure to give the "two witness" charge actually prejudiced him. *United States* v. *Olano*, 113 S. Ct. at 1778. Petitioner has not even attempted to carry that burden. He merely cites this Court's decision in *Weiler*, *supra*, for the proposition that a failure to give the charge is not a "technical" error. Pet. 28-29. In *Weiler*, however, the "two witness" charge was specifically requested, 323 U.S. at 607-608, and the Court emphasized that whether a defendant is prejudiced by a failure to give that charge turns on the specific facts of each case. *Id.* at 611 (distinguishing *Goins* v. *United States*, 306 U.S. 622 (1939), where the Court concluded that failure to give the charge "could not have prejudiced the petitioner"). Petitioner cannot demonstrate prejudice, because the government presented at least two witnesses, or one witness with other corroborating evidence, to establish petitioner's guilt on each of the separate perjury counts. See Gov't C.A. Br. 43-47 (reviewing evidence on Counts 2, 3, and 5); *United States* v. *Chaplin*, 25 F.3d 1373, 1382 n.10 (7th Cir. 1994)

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[7] Petitioner suggests (Pet. 27-28) that his failure to object to the charge should be excused, because the district court had already indicated a disagreement with the applicability of the "two witness" rule in federal court. As the district court noted, however, petitioner did not make his position clear, and a properly framed request for a two-witness instruction would not have been "unavailing." 6 R. 138, at 3-4.

(no plain error in failure to give "two witness" instruction where prosecution introduced sufficient evidence to satisfy rule and it was thus improbable that outcome of case would have been different if instruction had been given).[8]

Petitioner also claims (Pet. 29-30) that the district court erred in not instructing the jury on the two-witness rule, because that was his "theory of the * * * defense." Even when a defendant requests an instruction as his theory of the defense, however, failure to give that instruction is not reversible error unless the defendant demonstrates that the absence of the instruction seriously impaired his ability to present an effective defense. See *United States* v. *Banks*, 988 F.2d 1106, 1109 (11th Cir. 1993); *United States* v. *Wood*, 982 F.2d 1, 3 (1st Cir. 1992); *United States* v. *Neal*, 951 F.2d 630, 633 (5th Cir. 1992). Petitioner cannot make that showing. He presented a vigorous defense in which he contended, among other things, that the $3,500 check to Verla Mayo was a prepayment for work performed, that he legitimately sold his car and boat to Coor before the civil trial, and that Coor took over his business. He presented, along with the testimony of the persons involved in these transactions, other witnesses to support his version of events. He sought to impeach

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[8] Petitioner's reliance on *United States* v. *Chaplin*, *supra*, is misplaced. Although the court in *Chaplin* reversed a conviction because the government's proof on one count of the indictment did not satisfy the "two witness" rule, 25 F.3d at 1380-1381, the court specifically declined to find plain error in the district court's failure to give a "two witness" rule instruction on another count. Because there was sufficient evidence to satisfy the rule—which is the case here as well—the court concluded that it was improbable that the outcome of the case would have been different if the instruction had been given. *Id.* at 1382 n.10.

Verla Mayo's testimony by presenting a witness who testified to an alleged prior inconsistent statement by Mayo. And he forcefully argued to the jury that the statements at issue in the indictment were true and that the government had presented insufficient evidence to the contrary. See Gov't C.A. Br. 41-42.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1994